MOTION FILED
NOV 7 1994

No. 93-1935

In The

Supreme Court of the United States

October Term, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

HOLLIS T. HURD
(Counsel of Record)
THE BENEFITS DEPARTMENT
900 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-9924

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

43 pp

No. 93-1935

In The

Supreme Court of the United States

October Term, 1994

CURTISS-WRIGHT CORPORATION,

Petitioner,

v.

FRANK C. SCHOONEJONGEN, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of petitioner, Curtiss-Wright Corporation. The Chamber is the largest federation of business companies and associations in the world. With substantial membership in each of the 50 states, the Chamber represents approximately 220,000 businesses and professional organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in important matters before this Court, the lower courts, the United States Congress, the

Executive Branch and independent regulatory agencies of the federal government.

Accordingly, the Chamber has sought to advance those interests by filing briefs in cases of importance to the business community addressed by this Court. For example, the Chamber has participated *amicus curiae* in the following ERISA cases recently decided in this Court: *District of Columbia v. The Greater Washington Board of Trade*, ___ U.S. ___, 113 S. Ct. 580 (1992), *Patterson v. Shumate*, ___ U.S. ___, 113 S. Ct. 13 (1992), *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990), *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), and *Laborers Health & Welfare Trust Fund v. Advanced Lightweight Concrete*, 484 U.S. 539 (1988). In this case, the Court granted the motion of the Chamber to file a brief *amicus curiae* in support of petitioner at the *certiorari* stage.

The Chamber's members have a vital interest in the proper interpretation and application of ERISA because they collectively sponsor hundreds of thousands of employee benefit plans covered by ERISA, both pension and welfare. The misguided decision below, which throws into doubt the terms of most employee benefit plans covered by ERISA, profoundly and adversely affects the Chamber's members, potentially subjecting them to retroactive liability in proportions difficult to imagine and the prospect of unnecessary, time-consuming and expensive litigation over the operation of their plans for the past 19 years.

Petitioner has consented to the Chamber's filing of a brief *amicus curiae* in this matter, and a copy of the consent letter is being filed simultaneously herewith. Respondent has not consented.

Respectfully submitted,

HOLLIS T. HURD
(Counsel of Record)
THE BENEFITS DEPARTMENT
900 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-9924

Of Counsel:

STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZIEBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

QUESTIONS PRESENTED

1. Does ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3), require an employee benefit plan to identify specific individuals within the sponsoring organization who have authority to amend the plan, or otherwise require an amendment procedure more detailed than that contained in a plan that expressly reserves the sponsor's right to amend the plan?

2. Does a procedural noncompliance with ERISA causing no harm to plan participants – here, the Court of Appeals held that a plan's amendment provisions were insufficiently specific under ERISA § 402(b)(3) – give rise to a substantive remedy – here, striking an amendment from the plan document to invalidate a termination of nonvested welfare benefits?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. BY ACTUALLY NAMING A CORPORATION AS THE PERSON WITH AUTHORITY TO AMEND THE PLAN, THE CURTISS-WRIGHT PLAN EXCEEDS THE MINIMUM REQUIREMENTS OF ERISA SECTION 402(b)(3) 3

II. THERE IS NO BASIS IN THE LANGUAGE, STRUCTURE OR POLICY OF ERISA FOR STRIKING AN AMENDMENT MERELY BECAUSE THE AMENDMENT PROCEDURE WAS INSUFFICIENTLY DETAILED 12

III. THE DECISION BELOW UNSETTLES THE TERMS OF MILLIONS OF EMPLOYEE BENEFIT PLANS, IMPOSING UPON EMPLOYERS SIGNIFICANT COSTS NOT INTENDED BY CONGRESS AND BURDENING THE FEDERAL COURTS WITH A NEW, ENTIRELY UNNECESSARY CLASS OF ERISA LITIGATION 20

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES

Adams v. Avondale Indus., Inc., 905 F.2d 943 (6th Cir. 1990), *cert. denied*, 498 U.S. 984 (1990) 15

Alday v. Container Corp. of America, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) 4

Alexander v. Primerica Holdings, Inc., 967 F.2d 90 (3d Cir. 1992) 4

Anderson v. Alpha Portland Indus., Inc., 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989) 4

Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983) 28

Armistead v. Vernitron Corp., 944 F.2d 1287 (6th Cir. 1991) 4

Benedict v. United Inter-Mountain Telephone Co., 820 F. Supp. 354 (E.D. Tenn. 1993) 4

Biggers v. Wittek Indus., Inc., 4 F.3d 291 (4th Cir. 1993) 15

Box v. Coalite, Inc., 643 F. Supp. 709 (N.D. Ala. 1986) 4

Boyer v. Douglas Components Corp., 986 F.2d 999 (6th Cir. 1993) 4

Central States Pension Fund v. Central Transport, Inc., 472 U.S. 559 (1985) 5

Chervin v. Sulzer Bingham Pumps, Inc., 13 EBC 1089 (D. Or. 1990) 4

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 28

TABLE OF AUTHORITIES – Continued

Page

Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, ___ U.S. ___, 113 S. Ct. 2264 (1993).....5, 27

Finnell v. Cramet, Inc., 289 F.2d 409 (6th Cir. 1961) 5

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 5, 11, 27

Gordon v. Barnes Pumps, Inc., 999 F.2d 133 (6th Cir. 1993) 4

Harper v. Virginia Department of Taxation, ___ U.S. ___, 113 S. Ct. 2510 (1993) 28

In re Unisys Corp. Retiree Benefits Litigation, 837 F. Supp. 670 (E.D. Pa. 1993) 4

In re White Farm Equipment Co., 788 F.2d 1186 (6th Cir. 1986) 4

Ingersoll-Rand v. McClendon, 498 U.S. 133 (1990) 29

Joyce v. Curtiss-Wright Corp., 810 F. Supp. 67 (W.D.N.Y. 1992) 4

Local 144 Nursing Home Pension Fund v. Demisay, ___ U.S. ___, 113 S. Ct. 2252 (1993) 15

Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978) 28, 29

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134 (1985) 5

Mertens v. Hewitt Associates, ___ U.S. ___, 113 S. Ct. 2063 (1993).....5, 14, 15

Moore v. Metropolitan Life Ins. Co., 856 F.2d 488 (2d Cir. 1988) 4

Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989) 4

TABLE OF AUTHORITIES – Continued

Page

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359 (1980) 5

Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41 (1987) 12

Ryan v. Chromalloy American Corp., 877 F.2d 598 (7th Cir. 1989) 4

Senn v. United Dominion Indus., Inc., 951 F.2d 806 (7th Cir. 1992), *cert. denied*, ___U.S. ___, 113 S. Ct. 2992 (1993) 4

Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994) 4

Stewart v. KHD Deutz of America Corp., 980 F.2d 698 (11th Cir. 1993) 4

United Paperworkers Union v. Jefferson Smurfit Corp., 961 F.2d 1384 (8th Cir. 1992) 4

United Steelworkers v. Newman-Crosby Steel, Inc., 822 F. Supp. 862 (D.R.I. 1993) 4

Wise v. El Paso Natural Gas Co., 986 F.2d 929 (5th Cir. 1993), *cert. denied*, ___ U.S.___, 114 S. Ct. 196 (1993) 4

Woolford Realty Co. v. Rose, 286 U.S. 319 (1932) 20

STATUTES

Economic Recovery Tax Act of 1981, P. L. 97-34 22

ERISA sec. 3(9), 29 U.S.C. § 1002(9) 8

ERISA secs. 101(a), 102(a)(1), 104(b)(3), 105(a) and 105(c), 29 U.S.C. §§ 1021(a), 1022(a)(1), 1024(b)(3), 1025(a) and (c) 16

ERISA secs. 101(d), (e) and (f), 29 U.S.C. §§ 1021(d), (e), and (f) 10

ERISA sec. 209, 29 U.S.C. § 1059 10

TABLE OF AUTHORITIES – Continued

Page

ERISA sec. 302(c)(11), 29 U.S.C. § 1082(c)(11)..... 10

ERISA sec. 402(b), 29 U.S.C. § 1102(b) ..... *passim*

ERISA sec. 404, 29 U.S.C. § 1104..... 18, 24, 26, 27

ERISA sec. 409, 29 U.S.C. § 1109.....14, 27

ERISA sec. 412, 29 U.S.C. § 1112..... 12

ERISA sec. 414(a), 29 U.S.C. § 1114(a)..... 23

ERISA sec. 502(a)(3), 29 U.S.C. § 1132(a)(3).....14, 19

ERISA sec. 502(c)(1), 29 U.S.C. § 1132(c)(1)..... 14

ERISA sec. 502(e)(1), 29 U.S.C. § 1132(e)(1)..... 26

ERISA sec. 502(l), 29 U.S.C. § 1132(l)..... 27

ERISA sec. 503, 29 U.S.C. § 1133..... 19

ERISA sec. 515, 29 U.S.C. § 1145..... 10

ERISA sec. 606, 29 U.S.C. § 1166..... 10

ERISA secs. 4001(a)(13), 4007(e), 29 U.S.C. §§ 1301(a)(13), 1307(e) 10

ERISA sec. 4001(a)(14)(C)(ii)(V), 29 U.S.C. § 1301(a)(14)(C)(ii)(V)..... 8

ERISA sec. 4041(c)(2)(B), 29 U.S.C. § 1341(c)(2)(B) 10

ERISA sec. 4042(d)(1)(vii), 29 U.S.C. § 1342(d)(1)(vii) 10

ERISA sec. 4043(a), 29 U.S.C. § 1343(a)..... 10

ERISA sec. 4062(a), 29 U.S.C. § 1362(a)..... 10

ERISA sec. 4063(b), 29 U.S.C. § 1363(b) 10

ERISA secs. 4202 *et seq.*, 29 U.S.C. §§ 1382 *et seq.*..... 10

TABLE OF AUTHORITIES – Continued

Page

Internal Revenue Code of 1986, sec. 401(a), 29 U.S.C. § 401(a) 22

Miscellaneous Revenue Act of 1980, P. L. 96-605 22

Omnibus Budget Reconciliation Act of 1987, P. L. 100-203..... 22

Omnibus Budget Reconciliation Act of 1989, P. L. 101-239..... 22

Omnibus Budget Reconciliation Act of 1993, P. L. 103-66..... 22

Retirement Equity Act of 1984, P. L. 98-397 22

Revenue Act of 1978, P. L. 95-600..... 22

Tax Equity and Fiscal Responsibility Act of 1982, P. L. 97-248 22

Tax Reform Act of 1976, P. L. 94-455..... 22

Tax Reform Act of 1984, P. L. 98-369..... 22

Tax Reform Act of 1986, P. L. 99-514..... 22

Technical and Miscellaneous Revenue Act of 1988, P. L. 100-647 22

Unemployment Compensation Amendments of 1992, P. L. 102-318..... 22

LEGISLATIVE HISTORY AND REGULATIONS

29 C.F.R. § 2509.75-8..... 26

29 C.F.R. § 2580.412-3(a)(3)..... 12

TABLE OF AUTHORITIES – Continued

Page

H.R. 2, 93d Cong., 2d Sess., sec. 111(a)(1), *reprinted in 3 Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) at 3948 (1974) 6

H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 297-298, *reprinted in 3 Legislative History* at 4564-65 (August 12, 1974)..... 18

MISCELLANEOUS

1 C. Corman, *Limitations on Actions* (1991) § 9.10 24

1A A. Corbin, *Corbin on Contracts* (1963) § 186 5

2 H. Wood, *Limitation of Actions* (4th Ed. 1916) § 200..... 24

IV W. Fratcher, *Scott on Trusts* (1980) § 331..... 4

21 *Pension & Benefits Reporter* (BNA) at 1091 25

Administrative Policy Regarding Sanctions, announced March 26, 1991, Internal Revenue Manual 7(10)54..... 24

Employee Plans Closing Agreement Pilot Program ("CAP"), Internal Revenue Manual (11)10-80 24

G. Bogert, *The Law of Trusts and Trustees* (2d ed. 1983) Ch. 47, § 992 at 218-219 4

M. Brossman and K. Kamen, *Employee Benefit Issues 1993* at 386 (International Foundation of Employee Benefit Plans, 1993) 21

Restatement (Second) of Contracts (1979) § 89(a)..... 5

Restatement (Second) of Trusts, § 219, comments a, c (1959) 24

TABLE OF AUTHORITIES – Continued

Page

Restatement (Second) of Trusts, § 330, comment i 12

Restatement (Second) of Trusts, § 331 (1959).....4, 12

Restatement (Second) of Trusts, § 331, comment c 11

Restatement (Second) of Trusts, § 331, comment g (1959) 13

Retiree Medical Benefits: Who Are the 1992 Wyatt COMPARE Employers?, reported at 20 *Pension & Benefits Reporter* (BNA) 1079-1080 (May 17, 1993)..... 23

Rev. Proc. 94-16, 1994-5 I.R.B. 22 (Jan. 12, 1994)..... 25

Statement of Financial Accounting Standards No. 106..... 23

U. S. Department of Labor, *Monthly Labor Review* at 9 (March 1994) 23

Uniform Commercial Code § 2-209(1) 5

Voluntary Compliance Resolution Program ("VCR"), Rev. Proc. 92-89, 1992-46 I.R.B. 27, October 28, 1992, extended by Rev. Proc. 93-36, 1993-29 I.R.B. 73..... 24

INTEREST OF THE *AMICUS CURIAE*

The interest of the Chamber as *amicus curiae* is set forth in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

The Curtiss-Wright plan, by expressly reserving to Curtiss-Wright the authority to amend the plan, satisfies the minimum requirements of ERISA section 402(b)(3) for two reasons. First, ERISA requires a "procedure" for amendment. The "procedure" in the Curtiss-Wright plan is action by Curtiss-Wright. While ERISA accommodates other plans that may have need of more elaborate procedures, including weighted voting or the concurrence of third parties, the Curtiss-Wright plan needs no more "procedure" than action by Curtiss-Wright, which has always been considered sufficient under the common law of trusts, on which the ERISA provision is modeled.

Second, ERISA requires identification of the "person" with authority to amend. But "person" is a defined term in ERISA that explicitly includes corporations (as well as other business entities). By identifying the corporation with authority to amend, the Curtiss-Wright plan satisfies the ERISA requirement to identify the "person" with authority to amend. Reading ERISA to require identification of the individuals and the means by which the corporation acts is inconsistent, not only with the language of section 402(b)(3), but also with the structure of ERISA.

Even if the amendment provision of the Curtiss-Wright plan did not satisfy ERISA section 402(b)(3) as to form, it clearly satisfies ERISA as to substance by expressly reserving the right to amend and putting all who read the plan on notice of that right. Striking the amendment at issue in this case would elevate form over substance and finds no basis in the language, structure or policy of ERISA. On the contrary, it is apparent from the language, structure and policy of ERISA that section 402(b)(3) was intended as a tool for the fiduciary who

administers the plan to know what the terms of the plan are. Accordingly, the validity of amendments should be left to the fiduciary in the first instance, who can apply well-accepted principles from the common law of trusts to judge the validity of amendments. If the amendment provision in the plan leaves the fiduciary unable to judge the validity of an amendment, the fiduciary can always sue the employer under ERISA to compel the employer to upgrade the amendment provision in the plan.

The practical consequences of the decision below weigh heavily in favor of reversal. For one thing, the decision below affects literally millions of employee benefit plans – both pension and welfare – because the language of the Curtiss-Wright plan is the conventional language almost universally employed by drafters of employee benefit plans since ERISA. For another, virtually all such plans have undergone repeated amendment since ERISA for important reasons such as to comply with changes in law and regulations, to share the burden of costs between employers and employees, and to deal with corporate reorganizations such as acquisitions and divestitures.

Besides the breadth of the consequences, the seriousness of the consequences is startling. If prior amendments that were needed to comply with changes in law and regulations are suddenly void, pension and profit sharing plans intended to be qualified under section 401(a) of the Internal Revenue Code could be retroactively disqualified, with horrendous consequences to employers and employees alike. Welfare plans could be required to reimburse employees for millions of dollars of deductibles and co-pays that were instituted by plan amendment. Benefits that employers thought had been eliminated will spring back to life, creating enormous retroactive liability, and benefit increases that were granted by amendment will be retroactively declared void but will, in practical terms, be unrecoverable.

Perhaps worst of all, since plan administrators are fiduciaries bound to carry out the terms of the plan only insofar as those terms are consistent with ERISA, millions of plan administrators will be required to reconstruct what the terms of their plans are (and have been since ERISA took effect in 1975), ignoring all amendments adopted under the language held insufficient by the decision below. At risk of personal liability for any mistakes, prudence will dictate that the plan administrators flock to the federal courts for instructions, generating countless actions by plan administrator against defendant classes of past and present participants in the plan to settle the terms of the plan and the rights of the participants. Needless to say, putting the federal courts between the administrators and the participants to reconstruct everyone's rights for the past 19 years is a burden never intended by Congress in ERISA and would seriously impair the real intent of Congress in ERISA to foster and promote employee benefit plans.

ARGUMENT

I. BY ACTUALLY NAMING A CORPORATION AS THE PERSON WITH AUTHORITY TO AMEND THE PLAN, THE CURTISS-WRIGHT PLAN EXCEEDS THE MINIMUM REQUIREMENTS OF ERISA SECTION 402(b)(3).

The Curtiss-Wright plan expressly reserves the right to amend the plan and specifically names Curtiss-Wright as the person holding that right:

> The Company reserves the right at any time and from time to time to modify or amend, in whole or in part, any or all of the provisions of the Plan.

(4a.)

That is the conventional language used routinely by drafters of employee benefit plans. For example, recent years have seen an explosion of cases – like this one – where retirees have challenged the reduction or elimination of health insurance benefits. In almost every case

where the plan provision regarding amendment is reported, it is in substance identical to the language in the Curtiss-Wright plan.[1]

The conventional language originated long before ERISA. From the beginning of employee benefit plans, good drafters have expressly reserved to the employer the right to amend the plan at any time. This has always been considered necessary under the common law of trusts, which holds that a trust generally cannot be amended unless such authority is expressly reserved in the trust instrument. IV W. Fratcher, *Scott on Trusts* (1980) § 331 at 378-379; G. Bogert, *The Law of Trusts and Trustees* (2d ed. 1983) Ch. 47, § 992 at 218-219; *Restatement (Second)*

---

[1] *See, e.g., Gordon v. Barnes Pumps, Inc.*, 999 F.2d 133 (6th Cir. 1993); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S. Ct. 196 (1993); *Boyer v. Douglas Components Corp.*, 986 F.2d 999 (6th Cir. 1993); *Stewart v. KHD Deutz of America Corp.*, 980 F.2d 698 (11th Cir. 1993); *Alexander v. Primerica Holdings, Inc.*, 967 F.2d 90 (3d Cir. 1992); *Senn v. United Dominion Indus., Inc.*, 951 F.2d 806 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2992 (1993); *United Paperworkers Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384 (8th Cir. 1992); *Armistead v. Vernitron Corp.*, 944 F.2d 1287 (6th Cir. 1991); *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Ryan v. Chromalloy American Corp.*, 877 F.2d 598 (7th Cir. 1989); *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488 (2d Cir. 1988); *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051 (1989); *In re White Farm Equipment Co.*, 788 F.2d 1186 (6th Cir. 1986); *Sprague v. General Motors Corp.*, 843 F. Supp. 266 (E.D. Mich. 1994); *In re Unisys Corp. Retiree Benefits Litigation*, 837 F. Supp. 670 (E.D. Pa. 1993); *United Steelworkers v. Newman-Crosby Steel, Inc.*, 822 F. Supp. 862 (D.R.I. 1993); *Benedict v. United Inter-Mountain Telephone Co.*, 820 F. Supp. 354 (E.D. Tenn. 1993); *Joyce v. Curtiss-Wright Corp.*, 810 F. Supp. 67 (W.D.N.Y. 1992); *Chervin v. Sulzer Bingham Pumps, Inc.*, 13 EBC 1089 (D. Or. 1990); *Box v. Coalite, Inc.*, 643 F. Supp. 709 (N.D. Ala. 1986).

of Trusts § 331.[2] Under the common law of trusts, the conventional language was sufficient. *See, e.g., Finnell v. Cramet, Inc.*, 289 F.2d 409 (6th Cir. 1961) (Illinois law).

In 1974, ERISA created a "comprehensive and reticulated" scheme of minimum standards for employee benefit plans. *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980). Among those standards were fiduciary standards, which in large part were borrowed from, and intended to carry forward, the common law of trusts. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___, 113 S. Ct. 2264 (1993) (quoting *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329-332 (1981)); *Mertens v. Hewitt Associates*, ___ U.S. ___, 113 S. Ct. 2063 (1993); *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989); *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 156 (1985); *Central States Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570 (1985).

Carrying forward the common law of trusts, ERISA established a statutory requirement that every plan, at a minimum, provide an amendment procedure:

> Every employee benefit plan shall –
>
> . . .
>
> (3) provide a procedure for amending the plan, and for identifying the persons who have authority to amend the plan.

ERISA sec. 402(b), 29 U.S.C. § 1102(b). In short, section 402(b)(3) requires each plan to set out how amendments are made, including who makes them.

---

[2] This flows from the unilateral nature of a trust and stands in contrast to the law of contracts, under which the parties can amend by mutual consent and need not reserve such authority in the original contract. 1A A. Corbin, *Corbin on Contracts* (1963) § 186; *Restatement (Second) of Contracts* (1979) § 89(a); Uniform Commercial Code § 2-209(1).

An earlier version of what became section 402(b)(3) would have rigidly authorized the plan administrator to make amendments.[3] That proposal would have failed to take into account the variety, among different types of employee benefit plans, as to who can amend and how.

As for *who*, it is not unusual for an employer to retain a third-party to administer an employee benefit plan, but the employer would not want the third-party plan administrator to have the right to amend the plan. In some cases, the authority to amend is shared, such as between the employer and a union representing the employees covered by the plan. And in still other cases, the authority to amend is split. For example, many employers adopt prototype plans sponsored by banks and insurance companies, under which the bank or insurance company retains authority to amend the "boilerplate" provisions of the prototype plan and the employer retains the authority to amend those provisions peculiar to it. There simply was no single formulation of *who* that would accommodate the variety that already existed, so section 402(b)(3) wisely requires, as a minimum standard, only that the plan provide a procedure for identifying who can amend.

---

[3] H.R. 2, as passed by the House of Representatives on March 6, 1974, provided:

> The administrator . . . shall be deemed to have full authority and responsibility for the operation of such employee benefit plan including the authority to . . . amend such plan (except with respect to contribution rates) where such an amendment is necessary to meet the requirements of this title or where such an amendment is necessary to protect the interests of the participants.

H.R. 2, 93d Cong., 2d Sess. (1974), sec. 111(a)(1), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974* (Comm. Print 1976) at 3948.

As for *how*, there is also considerable variety. Before ERISA, when a pension or profit sharing plan commonly coexisted in the same document as the trust agreement and was administered by the trustee, it was common procedure that amendments would be made by the employer but would not take effect unless and until furnished to the trustee, who could veto amendments that materially increased the trustee's duties or liability. Occasionally, single-employer plans condition the validity of amendments on other procedural steps, such as approval by the Internal Revenue Service or notification to employees. And in the case of insured welfare plans, the procedure for amendment may include securing the written consent of the insurance company.

As for *how*, even greater variety exists in multiemployer plans – pension or welfare plans maintained by unrelated employers (sometimes thousands of unrelated employers) pursuant to collective bargaining agreements with one or more unions. In the multiemployer field, elaborate amendment procedures are not unusual, including weighting the votes of employers according to how many employees of that employer are covered by the plan or giving certain major employers (by name) one vote each and all other employers collectively one vote. Other procedures may provide for amendment by the trustees of the plan, followed by written notification to the employers, who can block the amendments by a two-thirds vote. The final formulation of ERISA section 402(b)(3) accommodates the variety of amendment procedures not by requiring any particular procedure but requiring, as a minimum standard, only that the plan have a procedure.

Still, in the vast majority of plans, there is no need of such elaborate "procedures." In the typical single-employer plan, the employer simply reserves to itself the

right to amend the plan – no weighted voting, no notice to other parties, and no concurrence by a trustee, union, insurer or governmental agency. In that case, the "procedure" is condensed down to action by the employer, without more. And the "procedure" automatically includes identification of the person with authority to amend: the employer. Thus, express reservation to the employer of the authority to amend satisfies the minimum requirements of ERISA section 402(b)(3).

It is important to note that "person" is a defined term in ERISA and includes not only individuals but also corporations and other business entities.[4] In the case of a corporation, therefore, if the definition were substituted for the defined term, ERISA section 402(b)(3) would read:

> Every employee benefit plan shall –
>
> . . .
>
> (3) provide a procedure for amending the plan, and for identifying the *corporations* who have authority to amend the plan.

Like most single-employer plans, the Curtiss-Wright plan clearly sets out how amendments are made and who makes them: by action of Curtiss-Wright. By actually identifying the corporation in the plan, rather than just providing a procedure for identifying the corporation, the Curtiss-Wright plan more than satisfies the ERISA section 402(b)(3); indeed, it exceeds the minimum requirement of that section.

---

[4] ERISA section 3(9), 29 U.S.C. § 1002(9), provides:

> The term "person" means an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association or employee organization.

When Congress wished to specify living human beings in ERISA, it used the word "individual." ERISA section 4001(a)(14)(C)(ii)(V), 29 U.S.C. § 1301(a)(14)(C)(ii)(V), defines "individual" as "a living human being."

The decision below misunderstands section 402(b)(3) in two respects. First, the decision below misunderstands "person" as requiring the plan to identify the individual or individuals who act for the corporation. It does not: by definition the corporation *is* the "person" who must be identified under section 402(b)(3). Second, the decision below assumes that the "procedure" referred to in section 402(b)(3) is the procedure by which the corporation governs itself – majority vote of a quorum of the board of directors at a meeting or unanimous written consent, for example. That is incorrect: the "procedure" is the procedure *for amending the plan*, in this case simply action by the employer, without more.

The distinction between a procedure for amending the plan and the procedure by which the actor acts is easy to see where the amendment procedure is elaborate, such as action by the employer, followed by timely notice to the bank trustee, followed by expiration of a period during which the bank trustee may reject the amendment. No one would complain that such a plan lacks a "procedure" because it does not specify how either the employer or the bank trustee arrives at its decision. On the other hand, where the procedure is nothing more than action by a corporation (as in this case), a court may be seduced by the simplicity of the procedure into probing deeper – into corporate governance – to find a "procedure." That is a mistake because the statute explicitly requires, not a procedure by which the corporation governs itself, but "a procedure *for amending the plan* . . . " ERISA sec. 402(b)(3) (emphasis added).[5]

---

[5] This also explains what appears at first glance to be somewhat odd phraseology in section 402(b)(3). One might have expected section 403(b)(3) to provide for identification of the actor first, followed by the procedure for how the actor adopts

Misunderstanding "procedure" in section 402(b)(3) as the procedure by which the corporation governs itself would also be inconsistent with the structure of ERISA. In ERISA, Congress repeatedly imposed obligations on "the employer," yet Congress never felt the need to specify how the employer is to act.[6] ERISA never descends to the level of specifying action by officers, or the board of

---

the amendment. If so, that formulation might have lent some support to the reading reflected in the decision below. Instead, the order of those elements is reversed: first the procedure for amending the plan and then, *as a part of that procedure,* identification of the person with authority to amend. Though odd at first glance, this formulation makes clear that identification of the actor is merely an element of the "procedure for amending the plan," which rules out the notion that "procedure" refers to the rules by which the actor acts.

[6] *See, e.g.*, ERISA sections 101(d), (e) and (f), 29 U.S.C. §§ 1021(d), (e), and (f) (notification of funding deficiency, providing information to the Medicare/Medicaid Data Bank); ERISA section 209, 29 U.S.C. § 1059 (maintenance of records); ERISA section 302(c)(11), 29 U.S.C. § 1082(c)(11) (liability for contributions to plan); ERISA section 515, 29 U.S.C. § 1145 (obligation to contribute to multiemployer plan); ERISA section 606, 29 U.S.C. § 1166 (notification under COBRA); ERISA sections 4001(a)(13), 4007(e), 29 U.S.C. §§ 1301(a)(13), 1307(e) (payment of premiums to the Pension Benefit Guaranty Corporation, through the definition of "contributing sponsor"); ERISA section 4041(c)(2)(B), 29 U.S.C. § 1341(c)(2)(B) (distress termination of pension plan); ERISA section 4042(d)(1)(vii), 29 U.S.C. § 1342(d)(1)(vii) (furnishing information to trustee of terminated plan); ERISA section 4043(a), 29 U.S.C. § 1343(a) (notification to plan administrator of reportable events); ERISA section 4062(a), 29 U.S.C. § 1362(a) (liability to the Pension Benefit Guaranty Corporation after termination of plan); ERISA section 4063(b), 29 U.S.C. § 1363(b) (liability upon withdrawal from multiple employer plan); and ERISA sections 4202 *et seq.*, 29 U.S.C. §§ 1382 *et seq.* (withdrawal liability to multiemployer plan).

directors, or any other individual who might act on behalf of the corporation. If Congress itself was content to impose its procedures and requirements on "the employer" throughout ERISA, without specification of how the employer acts, it is unreasonable to suppose that Congress would have been unsatisfied with a plan's designation of "the employer" as the person with authority to amend the plan, without specification of how the employer acts.

The decision below scoffs at the idea that a formulation such as "action by the employer" could be a sufficient procedure, without specifying how the employer acts. (7a-8a.) That reaction overlooks decades of development of the common law of trusts, under which it is entirely sufficient for the settlor to reserve the right to amend without specifying how the settlor will exercise that right. It also overlooks the well-developed competency of fiduciaries and the courts to resolve questions about the validity of employer action when presented. "The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.' " *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989).

For example, at common law, if the settlor reserves a right to modify the trust but does not specify how he shall exercise that right, the right may be exercised by any method which sufficiently manifests his intention to modify the trust. *Restatement (Second) of Trusts*, sec. 331, comment c. Any definitive manifestation by the settlor of his intention is sufficient, including, for example, execution and delivery to the fiduciary of a new instrument declaring terms different from the original instrument (as Curtiss-Wright did by issuing a new summary plan

description [5a, 36a, 38a-39a]) or communicating his intention to the beneficiaries (as Curtiss-Wright did by publishing the new summary plan description to participants [5a]). *Restatement (Second) of Trusts*, sec. 330, comment i, made applicable to amendment by sec. 331, comment c. There is no reason why the federal common law of employee benefits, called into being by ERISA, *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987), cannot employ similar principles to determine whether an employer has validly exercised its reserved right to amend, if and when the question is presented.[7]

Accordingly, the Court should hold, as to the first question presented, that the language of the Curtiss-Wright plan satisfies the minimum requirements of ERISA section 402(b)(3) by providing a procedure for amending the plan, *i.e.*, action by Curtiss-Wright, and identifying the person with authority to amend, *i.e.*, Curtiss-Wright. Such a holding would remove the need to consider the second question presented – the appropriate remedy for a violation.

II. THERE IS NO BASIS IN THE LANGUAGE, STRUCTURE OR POLICY OF ERISA FOR STRIKING AN AMENDMENT MERELY BECAUSE THE AMENDMENT PROCEDURE WAS INSUFFICIENTLY DETAILED.

According to the decision below, an employee benefit plan that expressly reserves to the employer the right to

---

[7] We would also note that, while the U. S. Department of Labor has issued no regulations under section 402(b)(3), it has issued regulations under ERISA section 412, 29 U.S.C. § 1112 (the bonding requirement of ERISA), which explicitly recognize that individuals may act on behalf of a corporation, in the performance of the corporation's duties with respect to an employee benefit plan under ERISA, with either actual or apparent authority. 29 C.F.R. § 2580.412-3(a)(3).

amend, but whose procedure is not sufficiently detailed to satisfy ERISA section 402(b)(3), cannot be amended (except to upgrade the amendment provision to comply with the decision below). In practical effect, the decision below holds that the remedy for a violation of section 402(b)(3) is to invalidate all amendments purportedly adopted under the plan's insufficiently detailed procedure. Such a remedy elevates form over substance and has no basis in the language, structure or policies of ERISA.

Lawyers all too quickly label any unfavorable decision an elevation of form over substance – to the point where the expression has lost much of its meaning. This, however, is the type of situation for which the expression was coined. The substance of the matter is that the Curtiss-Wright plan *does* expressly reserve to Curtiss-Wright the right to amend the plan. If that provision falls short of the ERISA requirement, the shortfall is one of form, not substance. Holding an amendment invalid, even though it was adopted pursuant to an express reservation of authority to amend, would truly elevate form over substance.[8]

ERISA does not require any such elevation. ERISA prescribes no specific remedy for violation of section 402(b)(3). Nowhere does ERISA state, or even suggest,

---

[8] In addition, the Curtiss-Wright plan expressly reserved the right to terminate the plan, which, at common law, may include the right to amend. 4a; *Restatement (Second) of Trusts*, § 331, comment g (1959). ERISA imposes no requirement with regard to termination procedures and, with regard to welfare plans, imposes no restrictions on termination. Curtiss-Wright could therefore have achieved the same result – without any possibility of challenge under ERISA – by terminating the plan and immediately replacing it with the amended plan, illustrating once again that the decision below elevates form over substance.

striking an amendment adopted pursuant to an amendment procedure that is insufficiently detailed.[9]

Like all other violations for which ERISA does not specify a remedy, a violation of section 402(b)(3) is subject to the general remedies for miscellaneous violations of ERISA, as set forth in ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3). Section 502(a)(3) says nothing about striking an amendment, however. It provides only for an injunction against the violation or other equitable relief:

> (a) A civil action may be brought –
>
> . . .
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.[10]

As this Court has held, section 502(a)(3) does not authorize an injunction or "other appropriate equitable relief" at large, but only for the purpose of redressing violations of (or enforcing) ERISA (where, as here, no violation of the plan is claimed). *Mertens v. Hewitt Associates*, 508 U.S. ___, 113 S. Ct. 2063 (1993). The question is, what is the violation of ERISA?

---

[9] By comparison, ERISA does prescribe specific remedies for certain violations, such as restitution for breach of fiduciary duty (ERISA section 409, 29 U.S.C. § 1109) and a penalty of up to $100 per day for failure to provide documents upon written request of a participant (ERISA section 502(c)(1), 29 U.S.C. § 1132(c)(1)).

[10] The Secretary of Labor is given similar enforcement authority in section 502(a)(5), 29 U.S.C. § 1132(a)(5), subject to certain restrictions specified in section 502(b), 29 U.S.C. § 1132(b).

In this case, if the language of the Curtiss-Wright plan violated section 402(b)(3), the violation would be a failure of the plan to include a sufficiently detailed provision regarding amendment. An injunction against the violation would be a court order requiring the sponsor (or whoever has authority to amend the plan) to upgrade the amendment provision to include greater detail. "Other equitable relief" might include the court's reforming the plan so as to include the required level of detail if the sponsor refused to do so. In no event would participants be awarded monetary relief as required by the decision below.[11]

Besides following *Mertens*, that approach would conform to this Court's analysis in *Local 144 Nursing Home Pension Fund v. Demisay*, ___ U.S. ___, 113 S. Ct. 2252 (1993). In *Demisay*, the Court observed that injunctive relief against a violation of section 302 of the Labor Management Relations Act, 29 U.S.C. § 186, depends on what the "violation" is. If the violation is payment of money to, or receipt of money by, a trust fund, the federal authority to enjoin violations extends no further than enjoining such payment or receipt; it does not authorize federal judicial oversight of the administration of the trust fund. In a like manner, since the violation of section 402(b)(3) (if there is one) is failure to include in the plan document adequate detail regarding amendment, injunctive relief should be limited to requiring the sponsor to add the required detail, not interfering with the administration of the plan by granting benefits to a class of participants who are not entitled to benefits.

---

[11] This would accord with the decisions of the other two Courts of Appeals that have addressed the issue. *Biggers v. Wittek Indus., Inc.*, 4 F.3d 291 (4th Cir. 1993), and *Adams v. Avondale Indus., Inc.*, 905 F.2d 943 (6th Cir.), *cert. denied*, 498 U.S. 984 (1990).

The structure and purpose of ERISA confirm that the appropriate remedy is improvement of the plan, not monetary relief to participants. Although the decision below is predicated on the participant's right to know what the terms of the plan are, section 402(b)(3) does not appear among the ERISA provisions regarding disclosure of information to participants. Disclosure of information to participants is found in Part 1 of Title I of ERISA – sections 101-111, 29 U.S.C. §§ 1021-1031. The various disclosures include the summary plan description, summaries of material modifications as needed, summary annual reports, a statement of accrued and vested benefits, and a copy of the information pertinent to a particular participant on the registration statement required under section 6057 of the Internal Revenue Code of 1986.[12] None of those disclosures includes any reference to, or description of, the plan's provision regarding amendments. Nor is any such disclosure required by any regulation under those sections.

Rather than in the provisions regarding disclosure to participants, section 402(b)(3) appears in the provisions regarding the performance of fiduciary responsibilities by fiduciaries – Part 4 of Title I. Congress evidently conceived of the amendment requirement, not in terms of disclosure to participants, but in terms of the fiduciary's performance of his fiduciary functions. And the placement of section 402(b)(3) *within* the fiduciary provisions makes its mission clear.

It is instructive to step back and look at section 402 as a whole, 29 U.S.C. § 1102. Section 402 begins with section

---

[12] ERISA secs. 101(a), 102(a)(1), 104(b)(3), 105(a) and 105(c), 29 U.S.C. §§ 1021(a), 1022(a)(1), 1024(b)(3), 1025(a) and (c). The last requirement refers to Schedule SSA, which is attached to the annual Return/Report of Employee Benefit Plan – Form 5500.

402(a), which requires that each plan be maintained pursuant to a written instrument under which the "authority to control and manage the operation and administration of the plan" is vested in "one or more named fiduciaries."

Then section 402(b) lists four provisions that each plan must have:

(1) "a procedure for establishing and carrying out a funding policy and method";

(2) a description of any procedure "for the allocation of responsibilities for the operation and administration of the plan";

(3) "a procedure for amending such plan, and for identifying the persons who have authority to amend the plan"; and

(4) specification of "the basis on which payments are made to and from the plan."

Finally, section 402(c) lists three optional plan provisions, permitting an individual to serve in more than one fiduciary capacity, permitting fiduciaries to employ advisors, and permitting a fiduciary to appoint an investment advisor.

The unifying theme of section 402 is committing the operation and administration of each plan to an identifiable person and providing that person with the tools to do the job – a procedure for establishing and carrying out a funding method (so the fiduciary knows how to manage the plan's finances), a procedure for allocation of fiduciary responsibilities (so the fiduciary can delegate), a procedure for amending the plan (so the fiduciary can determine what the terms of the plan are), and specification of the basis on which payments are made to and from the plan (so the fiduciary knows where to collect contributions and who is entitled to benefits). From the structure of section 402, there can be little doubt that Congress intended section 402(b)(3) primarily for the

benefit of the fiduciary administering the plan, not the participants.[13]

Stepping back one more step, and seeing how section 402 interacts with section 404, 29 U.S.C. § 1104, provides confirmation. Coming just two sections later, section 404(a)(1), 29 U.S.C. § 1104(a)(1), sets forth the duties of a fiduciary, prominent among them being the duty to administer the plan in accordance with the plan document:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> . . .
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title or Title IV.

Needless to say, the fiduciary cannot abide by the terms of the plan unless he knows what the terms of the plan are. In context, it is clear that section 402(b)(3) was intended as a tool for the fiduciary to know what the terms of the plan are.

Once it is understood that the purpose of section 402(b)(3) is to enable the fiduciary to administer the plan, rather than to inform the participants, several consequences follow that relate directly to relief for violation of

---

[13] The Conference Report on ERISA specifically confirms this conclusion, illustrating with respect to section 402(b)(1):

> [E]ach plan is to provide a procedure for establishing a funding policy and carrying out the plan objectives. This procedure is to enable the plan fiduciaries to determine the plan's short- and long-run financial needs and communicate these requirements to the appropriate persons.

H.R. Rep. No. 93-1280, 93rd Cong., 2d Sess. 297-298, *reprinted in* 3 *Legislative History* at 4564-65 (August 12, 1974).

section 402(b)(3). First, the determination of whether the plan provision regarding amendment is sufficient should be left to the fiduciary, at least in the first instance. If the plan provision is sufficient for the fiduciary to carry out his fiduciary function, the primary purpose of ERISA will have been fulfilled.[14]

Second, if the fiduciary concludes that the plan provision regarding amendment is insufficient to enable the fiduciary to judge the validity of amendments, the fiduciary may sue the sponsor of the plan (usually the employer) under section 502(a)(3) for injunctive relief – compelling the employer to upgrade the amendment provision to satisfy section 402(b)(3). (It is unlikely, of course, that a fiduciary who informed an employer of this problem would ultimately be forced to sue.)

Third, if a participant or beneficiary of the plan is actually affected by a plan amendment and takes a different view from the fiduciary as to the effectiveness of the plan amendment, the claim and appeal procedures of ERISA should be used and exhausted. ERISA sec. 503, 29 U.S.C. § 1133; 29 C.F.R. § 2560.503-1. Thereafter, a disappointed participant or beneficiary may sue the fiduciary under section 502(a)(1)(B), as with any other claim for benefits that is denied.

In this way, the policies of ERISA will be furthered to (i) commit plan administration, including questions of plan interpretation, to fiduciaries in the first instance (rather than to the federal courts) and (ii) encourage private resolution of disputes within the framework of the ERISA-mandated claim and appeal procedures. In

---

[14] This also addresses the question of disclosure of the terms of the plan to participants, since it is the *fiduciary* who is responsible for disclosing them to participants. *See* n. 12, *supra*.

such a framework, it should be unnecessary even to consider striking plan amendments.

With regard to remedy, the most important point to remember is that the plan *does* reserve to Curtiss-Wright the right to amend. If the wording is not so detailed as ERISA section 402(b)(3) requires, the remedy should be to improve the wording, not to pretend that the plan contains no reservation of authority to amend (and award monetary relief to the participants), especially where neither the language, the structure, nor the policy of ERISA requires such a drastic result.

III. THE DECISION BELOW UNSETTLES THE TERMS OF MILLIONS OF EMPLOYEE BENEFIT PLANS, IMPOSING UPON EMPLOYERS SIGNIFICANT COSTS NOT INTENDED BY CONGRESS AND BURDENING THE FEDERAL COURTS WITH A NEW, ENTIRELY UNNECESSARY CLASS OF ERISA LITIGATION.

The practical effect of the decision below is to void all amendments to most single-employer benefit plans since the enactment of ERISA. The consequences of that result are broad, given the millions of employee benefit plans likely affected, and extremely serious. If it is true that "[e]xpediency may tip the scales where arguments are nicely balanced,"[15] expediency lays a heavy hand on petitioner's side of the scales.

As to the breadth of the impact, the universe of single-employer pension and welfare plans covered by ERISA is large indeed. It comprises both pension plans (pension, profit sharing, 401(k), ESOP, etc.) and welfare plans (medical, life insurance, disability, severance, etc.).

---

[15] *Woolford Realty Co. v. Rose*, 286 U.S. 319, 330 (1932) (Cardozo, J.).

According to a recent tabulation by the U. S. Department of Labor, there were 873,000 single-employer pension plans covered by ERISA in 1987. In addition, in 1987, there were an estimated 4,500,000 welfare plans covered by ERISA.[16]

Use of the conventional language is widespread – indeed, almost universal – because, until the decision below, no employer or drafter had any reason to doubt the sufficiency of the conventional language. The U. S. Department of Labor, which is responsible for interpreting and enforcing ERISA, has issued no regulation on the subject, no ruling, no advisory opinion, no hint of any kind that the conventional language might be insufficient under ERISA. Except for the decision below, the conventional language has survived almost 20 years of ERISA litigation, not only without being invalidated, but without even being *challenged*, as far as we can determine.

The breadth of the impact is emphasized by the frequency with which amendments are adopted; employee benefit plans undergo regular and, in many cases, constant change. These amendments serve a variety of purposes, such as (i) updating the plan to comply with changes in the law and regulations, (ii) rearranging benefits to better meet the needs of employees, (iii) improving or reducing benefits in accordance with the employer's ability to pay, and (iv) conforming the plan to changes in the employer's situation, such as acquisitions and divestitures. Aside from a relative handful of brand new plans,

---

[16] M. Brossman and K. Kamen, *Employee Benefit Issues 1993* at 386 (International Foundation of Employee Benefit Plans, 1993). Figures for pension plans come from the annual reports that plans are required to file with the Department of Labor. Since many small welfare plans are exempt from filing the annual report, the figure for welfare plans is an estimate by the Department of Labor.

it is doubtful that there is any single-employer benefit plan covered by ERISA – whether pension or welfare – that has not been amended repeatedly since ERISA.

For example, in the 19 years since enactment of ERISA in 1974, Congress has changed the law applicable to pension and profit sharing plans that are intended to qualify under section 401(a) of the Internal Revenue Code, 29 U.S.C. § 401(a), at least a dozen times, not to mention constant changes in regulations.[17] In response, employers have regularly exercised their authority to amend, under the conventional reservation language of their plans, to keep the plans in compliance with section 401(a).

For another example, the vast majority of medical plans for active employees have been amended in recent years in order to implement cost containment features, such as employee contributions, deductibles, co-pays, preferred provider organizations, etc.[18] It is generally

---

[17] *See, e.g.*, Omnibus Budget Reconciliation Act of 1993, P. L. 103-66; Unemployment Compensation Amendments of 1992, P. L. 102-318; Omnibus Budget Reconciliation Act of 1989, P. L. 101-239; Technical and Miscellaneous Revenue Act of 1988, P. L. 100-647; Omnibus Budget Reconciliation Act of 1987, P. L. 100-203; Tax Reform Act of 1986, P. L. 99-514; Retirement Equity Act of 1984, P. L. 98-397; Tax Reform Act of 1984, P. L. 98-369; Tax Equity and Fiscal Responsibility Act of 1982, P. L. 97-248; Economic Recovery Tax Act of 1981, P. L. 97-34; Miscellaneous Revenue Act of 1980, P. L. 96-605; Revenue Act of 1978, P. L. 95-600; Tax Reform Act of 1976, P. L. 94-455.

[18] Between 1979 and 1991, the percentage of participants who were required to contribute toward the cost of health care for themselves under ERISA-covered plans nearly doubled – to 51% – and the amount of the employee contribution was raised by 2½ times. Likewise, in 1980, only 3% of participants in medium and large establishments were enrolled in managed care programs; in 1991, 33% were enrolled in managed care

understood that such amendments have been instrumental in holding down the cost of medical plans (at least by slowing the rate of increase in cost) and, therefore, keeping medical plans affordable for employers and employees alike.

There have also been major amendments to medical plans for retirees. According to a recent survey, two thirds of companies made changes in their retiree medical plans in 1991 or 1992, principally because of Statement of Financial Accounting Standards No. 106, adopted in December 1990. Approximately one third of employers surveyed amended their plans to increase the retiree contribution toward medical coverage. Sixteen percent increased deductibles or out-of-pocket maximums. Ten percent changed eligibility standards.[19]

Voiding virtually all amendments adopted since ERISA would have a variety of serious, adverse consequences wholly unintended by Congress in ERISA and will work directly contrary to the intent of Congress in ERISA to promote and encourage employee benefit plans.[20]

---

programs. Just from 1986 to 1991, the percentage of participants subject to hospital pre-admission certification rose from 16% to 63%. U. S. Department of Labor, *Monthly Labor Review* at 9 (March 1994).

[19] *Retiree Medical Benefits: Who Are the 1992 Wyatt COMPARE Employers?*, reported at 20 *Pension & Benefits Reporter* (BNA) 1079-1080 (May 17, 1993).

[20] The extent of the retroactive effect depends on the statute of limitations. At a minimum, the decision below voids amendments adopted within the period of the most analogous state statute of limitations, likely a period of at least several years. Employees will undoubtedly argue, however, that the decision below voids all amendments adopted since the effective date of ERISA section 402(b), which is January 1, 1975 (ERISA sec.

Disqualification of a pension or profit sharing plan under section 401(a) of the Internal Revenue Code means that (i) the employer loses the deductions that it took under section 404 of the Internal Revenue Code for contributions to the plan, (ii) the employees must pay federal income tax on the value of their vested interests in the plan (though they receive no money with which to pay the taxes), (iii) the trust becomes a taxable entity and owes federal income tax on its earnings, and (iv) distributions from the plan to employees do not qualify for special tax treatment such as rollover to an individual retirement account. The effect on employers and employees alike can be devastating.[21]

414(a), 29 U.S.C. § 1114(a)), on the theory that the plan administrator has a fiduciary duty to apply the terms of the plan as they exist under law, without regard to any invalid amendments, no matter when they occurred. This principle is analogous to the principle of the common law of trusts that a fiduciary generally may not invoke the statute of limitations against a beneficiary. 1 C. Corman, *Limitations on Actions* (1991) § 9.10; *Restatement (Second) of Trusts* § 219, comments a, c; 2 H. Wood, *Limitation of Actions* (4th Ed. 1916) § 200.

[21] Due to the vigorous and unforgiving enforcement posture of the Internal Revenue Service, disqualification is an immediate, not remote, possibility. Over the past few years, the Internal Revenue Service has been aggressively seeking out plans that have not been amended to comply with recent changes in the law and disqualifying them unless the sponsor agrees to pay very substantial penalties, in some cases ranging into the tens of millions of dollars. Administrative Policy Regarding Sanctions, announced March 26, 1991, Internal Revenue Manual 7(10)54; Employee Plans Closing Agreement Pilot Program ("CAP"), announced December 21, 1990, established as a permanent program on October 9, 1991, Internal Revenue Manual (11)10-80; Voluntary Compliance Resolution Program ("VCR"), Rev. Proc. 92-89, 1992-46 I.R.B. 27, October 28, 1992, extended by Rev. Proc. 93-36, 1993-29 I.R.B. 73, and made per-

Where plan amendments have reduced benefits, employees can be expected to sue to recoup the amount of the reduction. To take one common example, suppose that an employer recently amended its medical plan to convert from a so-called "first dollar" plan (where all medical expenses are covered in full) to a so-called "comprehensive" plan (where the employee must pay a deductible before any expenses are covered and then must make a "co-pay" until the "out-of-pocket maximum" is reached). According to the decision below, if the plan's amendment provision was the conventional reservation of authority, all employees would be entitled to recoup from the plan the deductibles and co-pays that they paid after the amendment.

Where benefits have been eliminated, employees can be expected to sue to recover the full benefits. This case is the perfect example: the employer amended the plan to eliminate medical coverage for retirees but the retirees won full payment of the benefits nonetheless. As noted above, elimination (or reduction) of medical benefits for retirees has been widespread in recent years, accelerating after the promulgation of FAS 106 in December 1990. Yet victory for retirees is virtually automatic under the decision below, thus retroactively denying employers all of the savings that they believed to have been achieved.

Ironically, plan amendments are just as likely to have *improved* the benefits of the plan, but plan administrators, as fiduciaries under ERISA, will be required to roll back

---

manent by Rev. Proc. 94-62, 1994-39 I.R.B. 11. See also Rev. Proc. 94-16, 1994-5 I.R.B. 22 (Jan. 12, 1994).

As of March 31, 1994, the IRS had closed 820 cases under CAP involving 330,000 participants; about 170 cases are still pending. IRS has received 650 cases under VCR and 100 under "Standardized VCR" ("SVP") as of April 30, 1994. 21 *Pension & Benefits Reporter* (BNA) at 1091.

the terms of the plan to where they stood before any post-ERISA amendments. As a result, it will be clear that many participants have been paid far more than they were entitled to, under the terms of the plan as now understood in retrospect.

Yet, for obvious reasons, plan administrators will find it impossible, as a practical matter, to recoup these overpayments of benefits. Any attempt to do so will produce lengthy litigation in federal court, likely involving fact-intensive questions of estoppel, for example.[22] In the end, employers likely will be required to absorb these additional costs, resulting in a "heads-I-win, tails-you-lose" double whammy for employers, already reeling under the escalating cost of health care.

Beyond the disastrous impact on millions of plans and employers, the decision below would have a disastrous impact on the federal judiciary, by creating a new, quite unnecessary class of ERISA litigation. This conclusion arises from the role of the plan administrator as a fiduciary under ERISA – a dimension that the decision below did not take into account.

There is no doubt that the plan administrator under ERISA exercises fiduciary responsibility in interpreting and applying the plan. 29 C.F.R. § 2509.75-8. As a fiduciary, the plan administrator is bound by section 404(a)(1)(D), which obligates the plan administrator to adhere to the terms of the plan, *but only to the extent that such terms are consistent with ERISA*. Yet the decision below holds, as a matter of law under ERISA, that plan amendments adopted pursuant to the conventional reservation of authority to amend are *not* consistent with

---

[22] Jurisdiction of such actions will lie exclusively in federal court under ERISA section 502(e)(1), 29 U.S.C. § 1132(e)(1).

ERISA. ERISA section 404(a)(1)(D) therefore forbids the plan administrator to give them effect.[23]

Under the decision below, therefore, the plan administrator of each affected plan has a fiduciary duty under ERISA to reconstruct the terms of the plan ignoring all such amendments. Moreover, the plan administrator acts in peril of personal liability for any error in applying the decision below to the history of the plan since 1975, since, under ERISA, fiduciary liability is personal, not a liability of the plan. ERISA sec. 409, 29 U.S.C. § 1109; *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, ___ U.S. ___, 113 S. Ct. 2264 (1993). And ERISA section 502(l), 29 U.S.C. § 1132(l), imposes an additional 20% penalty upon the fiduciary personally (unless waived or reduced by the Secretary of Labor).

In the climate of uncertainty created by the decision below, and faced with enormous personal liability, the only prudent course for plan administrators, as fiduciaries under ERISA, will be to apply to a federal district court for instructions as to what the terms of the plan are (and have been since 1975). This Court has expressly recognized the right of a fiduciary under ERISA to apply to a federal court for instructions. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989) ("A trustee who

---

[23] The decision below expresses the hope that it can be limited to only those amendments which are challenged by participants, presumably only those which adversely affect participants. 11a, n. 5. That hope is vain; as a fiduciary under ERISA, the plan administrator has a spontaneous, federal statutory duty to determine what the terms of the plan are and then to carry them out, regardless of whether anyone has challenged them. As a fiduciary, the plan administrator simply is not permitted to give effect to plan terms that are unlawful under ERISA.

is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court.")

Needless to say, enmeshing the federal courts in deciding what the terms of most single-employer pension and welfare benefit plans have been over the past 19 years represents a cost to the private sector and a burden to the judiciary that cannot possibly have been intended by Congress in ERISA and can only have the effect of reducing the funds available to actually pay benefits under such plans, as well as discouraging formation of such plans.

It can be readily admitted that these broad and serious effects flow from the retroactivity of the decision below, which may be required under *Harper v. Virginia Department of Taxation*, ___ U.S. ___, 113 S. Ct. 2510 (1993). Alternatively, the Court could affirm without such effects if the Court were to apply its decision prospectively only, in accordance with *Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). It is very safe to say that (i) this case presents "an issue of first impression whose resolution was not clearly foreshadowed," *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971), (ii) prospective application of the new rule will not retard its application in light of its history, purpose and effect, *id.* at 107, because it is designed to assist fiduciaries, not participants, and (iii) the decision "could produce substantial

inequitable results if applied retroactively," *id.* at 107, as just described in detail.[24]

CONCLUSION

In ERISA, Congress sought and achieved a balance between the rights of employees and the burdens on employers, recognizing that misguided regulation could easily go overboard and, ironically, lead to the elimination of employee benefit plans. *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990). This Court has repeatedly upheld the balance that Congress achieved in ERISA against those who would upset it by imposing additional burdens on employers, and, for the foregoing reasons, the time has come to do so again:

1. The Court should hold that the reservation of authority to amend in the Curtiss-Wright plan satisfies ERISA section 402(b)(3). Accordingly, the decision below should be reversed.

2. Alternatively, if the Court concludes that the reservation of authority to amend in the Curtiss-Wright plan is not sufficiently detailed to satisfy ERISA section 402(b)(3), the Court should nevertheless hold either that

---

[24] This case actually makes rather a stronger case for prospective application than did *Manhart*. In *Manhart*, some government agencies had opined that the unequal contribution approach was unlawful; here, neither the U. S. Department of Labor nor any other government agency has ever suggested that the conventional language was insufficient. In *Manhart*, the challenged conduct was limited to those relatively few pension plans which did not provide equal benefits for men and women; here, the challenged language is spread densely throughout the universe of both pension and welfare plans. In *Manhart*, the Court confronted (and dispensed with) a presumption in favor of retroactive relief under Title VII; here, there is no such specific presumption to be overcome.

striking the amendment is an inappropriate remedy under ERISA or that such relief should be applied prospectively only. Accordingly, the decision below should be reversed.

Respectfully submitted,

HOLLIS T. HURD
(Counsel of Record)
THE BENEFITS DEPARTMENT
900 Fifth Avenue
Pittsburgh, PA 15219
(412) 471-9924

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
MONA C. ZEIBERG
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337